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The Moral Environment of the Law

Charles Frankel

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I. LAW AND THE ENFORCEMENT OF MORALITY

There is a much debated issue in the philosophy of law which is fundamental to the theory of human liberty—the obligations of the law to morality. A free society confronts a kind of chronic paradox. One of the most basic of liberties—perhaps the one which, in the end, gives the most meaning to all the others—is that of being permitted to live in accordance with one's own lights, deciding for oneself what the standards of a good life are, and behaving in conformity with those standards. And yet, there obviously have to be limits to this liberty, and not only because one individual's behavior can affect the liberties and rights of others.

A larger reason is that we are born as infants, absolutely dependent on social support and yet, in Hobbes' pregnant phrase, "unapt for society." We have needs and drives that impel us to join with others, but the orientation and organization of our desires so that they will not be mutually frustrating and so that they will not interfere with, but will support, the inherited enterprises of civilization is in large measure a learned skill. Society has to impart this skill generation after generation, preserving—recovering—the arts of self-regulation and social intercourse from the impact of the new arrivals on its scene. It has to decide, too, which of the old arts, the old truths, the old values, have lost their authority and which are worth reiteration. It is constantly engaged, therefore, in an educational and critical task, in part unconscious, in part conscious, concerned with the transmission and redefinition of norms.

Nor can the individual perform the task of locating himself in or against his surrounding culture entirely for himself. He may disagree with many of his society's norms, find them constricting, painful, unreasonable, and wish to depart from them,

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** Old Dominion Professor of Philosophy and Public Affairs, Columbia University School of Law.

but if his society offers him no counsel, if it does not suggest with some strength and clarity what it requires, prefers, permits, prohibits, the individual is left awash in an uncharted sea and cannot even define an act of rebellion. He has no premises with which to begin his search for his own individuality. Franz Kafka graphically described the condition of the individual thrown back entirely on his own resources: "All is imaginary—family, office, friends, the street, all imaginary, far away or close at hand, the woman; the truth that lies closest . . . is only this, that you are beating your head against the wall of a windowless and doorless cell."[1] This condition is normlessness, *anomie*; it is a painful condition for the individual and a destructive condition when it becomes widespread in society at large.

What, then, is the proper function and sphere of the law with regard to the protection, on one side, of the moral liberty of individuals, and the protection, on the other side, of a structure of clear, identifiable standards of moral conduct? By and large, the discussion of this large question has revolved around three sub-questions:

(1) What is the influence on law of the moral beliefs and traditions of the community? This is an empirical issue.

(2) What is the responsibility of the law with regard to the enforcement of morality? This is a normative matter.

(3) Is there a set of higher moral principles that will tell us *what* the law ought to try to enforce or protect and what it should not? This issue, too, is obviously normative.

My concern in these lectures is principally with the two normative questions—the legal enforcement of morality and the relationship of the law to higher moral principles. But it may be helpful in putting these issues in perspective if we first take notice of one aspect of the empirical relationship between the law and the moral standards of the community.

It is obviously true that the mores of a society influence its laws. But the reverse relationship—the influence of the laws on the mores—is of equal importance. This influence can be particularly profound in contemporary societies, where the reach of government is long, its presence is almost constantly visible, and its authority comes mantled in the symbols and doctrine of popular sovereignty. When, for example, the laws, seeking to

1. THE DIARIES OF FRANZ KAFKA, 1914-1923 at 197 (M. Brod ed. 1949).

be nonpartisan with regard to controverted moral issues, come to permit what has previously been prohibited—abortion, say, or gambling, or business on Sundays—their impact is not felt to be, nor is it in fact, nonpartisan. In its own terms the law may be strictly neutral in the sense that it neither commands nor prohibits abortion, gambling, or business on Sundays. Nevertheless, the new laws do not merely expand the options that individuals may legally contemplate. They tend to change the perception of previously prohibited acts. The tendency to think them sinful or wrong loses the support of the law and, therefore, some of the moral authority that the law's support had given it.

I offer this proposition as an assumption that I cannot argue here. Nevertheless, it seems to me to be rooted in that "robust common sense" on which Cardozo said that the evolution of the law depends, and it is only fair to admit that it will control much of what I shall have to say. A plea for the isolation of the law from the competition of moral ideas seems to me like a plea for the isolation of the United States from the economic and political rivalries of the international scene. To follow such a policy would at once affect in multitudinous ways the destinies of most nations on the planet, and saying that we have no right to intrude on their affairs would not relieve us from responsibility for the consequences of our escape to the innocence of non-involvement. In practical terms, the choice the law faces in regard to morals is like the choice the United States faces in foreign affairs. It is not between the extremes of total isolation and total involvement everywhere. It is a question of resources and priorities, of when to act, where, in what way, and in accordance with what general principles or guidelines.

What, then, are the proper means and justifying circumstances, the principles and guidelines, by which the law should direct its activities with regard to the enforcement of morality? It will be best, I think, not to discuss this question purely abstractly, but to use a concrete issue as the material for generating, if possible, some general answers. The issue that I shall choose is the current heated debate in almost every part of our country about the regulation of pornography and obscenity.

I do not choose this subject because I think it the most important moral problem we confront, but because it offers a peculiarly useful test of the meaning and validity of fundamental assumptions. My concern will not be primarily with constitutional questions but with the underlying philosophical and

jurisprudential issues on which they turn. I should perhaps say at this point, too, that you will be wrong if you infer from what I am shortly going to argue that I am a strong advocate of censorship. It happens that I am unable to persuade myself that the arguments commonly offered by libertarians are sound, but it also happens that, on the practical issue of censorship, I am in general sympathy with the libertarians. Of course, you may ask why I should worry about people's premises and arguments when I am in agreement with them on the practical results. To this I can only say that, apart from the merits or demerits of the particular arguments I offer, I shall have accomplished my main purpose in these lectures if I persuade some of you that a jurisprudential preoccupation with premises and principles may have its own interest and utility.

In this discussion of pornography and obscenity I set aside the private possession of pornographic materials and the private indulgence in obscene conduct. The individual's right to privacy, as the Supreme Court found in *Stanley v. Georgia*,[2] seems to me the controlling consideration in this area. My concern is with the pornographic in public gathering places such as bookstores, theatres, and bars, with pictures and performances in which individuals engage in obscene acts, and with the advertising of such pornography on the streets and in the public press. Broadly, the questions I wish to ask fall into the area mapped by the late Alexander Bickel, when he wrote:

> Never mind whether books get girls pregnant, or whether sexy or violent movies turn men to crime. Assume that they do not, or that, at any rate, there are plenty of other efficient causes of pregnancy and crime. Assume further that we must protect privacy . . . .
>
> Take these assumptions, and still you are left with at least one problem of large proportions. It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. . . . [I]f [a man] demands a right to obtain the [obscene] books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.[3]

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2. 394 U.S. 557 (1969).

3. Bickel, *On Pornography: II. Dissenting and Concurring Opinions*, 22 PUB. INTEREST 25, 25-26 (1971).

Is this environmental effect of public pornography a fit subject for legal regulation? The arguments about this question sharply divide our society; they also reveal our own divided minds. This is the era of environmental law, and beyond concern for the physical environment, including its aesthetic qualities, government and law have assumed vast parental and tutelary responsibilities with regard to the social environment. In countless ways the laws limit our freedom, and do so, it is claimed, for our own good.[4] Nor have many libertarians commonly opposed this paternalistic trend in the laws by invoking John Stuart Mill's classic liberal maxim that the individual's "own good, either physical or moral, is not a sufficient warrant"[5] for such intrusions on his sphere of liberty. Yet when we turn to the protection of the moral environment in which we live, work, play, and educate our children and ourselves, the banners of laissez faire go up on the flagpoles. According to Chief Justice Warren, a man not noted for his anti-libertarian views, there is a "right of the Nation and of the States to maintain a decent society . . . ."[6] Yet the legal regulation of the moral environment, it is very widely held, involves impermissible encroachments on fundamental individual rights.

At least at first blush, the situation would strike an outside observer as puzzling. Historically, it has been the moral environment that has received the major public attention, as evidenced in the provision for public schools, the supervision of the conditions of labor of women and children to protect them from corrupting influences, and the rules against the possession and dissemination of pornographic materials. Some of this concern, it can be said, has rested on questionable assumptions and superstitious fears. But if there were an iron-clad prohibition against the making of laws that rest on questionable assumptions and superstitious fears, the history of economic legislation, conservative and liberal, would be very different from what it is. Moreover, one of the principles of traditional educational theory and social psychology that contemporary liberal philosophers have most strenuously reaffirmed is that the general environment—"what is commonly read and seen and heard and done" —is likely to have a greater influence on people's personal-

4. In "Blue-Sky Laws," for example, or in keeping cyclamates off the market.

5. J.S. MILL, ON LIBERTY 15 (*The World's Classics* ed. 1912).

6. Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

ities, goals, and behavior than any specific lessons they may be taught by parents or teachers, and that public funds and the public force, therefore, may and should be used to provide the right physical, emotional, and cultural surroundings for the development of socially desirable habits and attitudes.

In practical terms as well, liberal thinkers themselves have been far from constant in their adherence to a counsel of laissez faire. Let me cite some remarks by two liberal writers, John P. Roche and Milton M. Gordon, in 1955, commenting on the Supreme Court's decision in *Brown v. Board of Education*,[7] which outlawed racial segregation in the schools:

> Opponents of the desegregation decision . . . cite the dismal failure of Prohibition as a case in point, urging that basic social change—however desirable—must come from the bottom, from a shift in "grass-roots" convictions.
>
> On the other hand, the court's supporters maintain that virtually every statute and judicial decree is, to some extent, a regulation of morality. Indeed, they suggest, if the moral standards of individuals were not susceptible to state definition and regulation, we would never have emerged from primitive barbarism . . . .[8]

I do not know the views of Messrs. Roche and Gordon on the question of the regulation of pornography. But I do know that many who shared their views in 1955 would today vigorously assert the principle that the law should stay away from the regulation of morality. What reasons are put forward as requiring us to adopt this hands-off attitude towards an obtrusive feature of our external environment?

One is that pornography and obscenity are forms of speech or expression and must therefore be granted full freedom. Let us begin our analysis with an inspection of this principle. In the majority report of the congressionally authorized and presidentially appointed Commission on Obscenity and Pornography, for example, the statement is made that "[c]oercion, repression and censorship in order to promote a given set of views are not tolerable in our society."[9] In conformity with this principle, the

7. 349 U.S. 294 (1954).

8. Roche & Gordon, *Can Morality be Legislated?*, N. Y. Times, May 22, 1955, at 10 (Magazine).

9. W. LOCKHART, REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 56-57 (New York Times-Random House ed. 1970) [hereinafter cited as LOCKHART COMMISSION REPORT].

Commission majority recommended, *inter alia*, that all federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed.[10]

But can we accept the principle that coercion, repression, and censorship in order to promote a given set of views are not tolerable in our society? Sympathetic as one may be with the intentions behind it, it does not withstand scrutiny, I submit, unless substantial qualifications are added to it. At least *prima facie*, for example, there is a conflict between this principle and the laws restricting the access to the airwaves of people who favor cigarette smoking. Again, in almost all public schools the sympathetic portrayal of heterosexual love, within conventional limits of decorum, is permitted and applauded. Not so, however, with homosexual alternatives. And while there are objections to one or another such restriction, I am acquainted with no one, however libertarian, who would argue that all such restrictions on the free flow of opinions should be removed.

In fact, of course, there are many legal restrictions on the free flow of opinions that are commonly accepted. There are truth-in-advertising laws; I cannot maliciously defame other people; I cannot employ "fighting words" in certain circumstances; I cannot invade people's privacy without the presence of strong excusing or justifying conditions. Despite the strong position accorded to free expression by our laws, the expression of opinion is regulated, and the regulation is conducted against the background of a balancing of interests and of the assumption that some interests are significant enough even to prevail, on occasion, against the interest in free expression. In this sense, the law's function as a judge and teacher of comparative values—in other words, a moral arbiter—seems to me inescapable, and it is exercised even in relation to freedom of expression.

Consider, indeed, what libertarians themselves commonly concede. In relation to pornography and obscenity, they agree that regulation of freedom of expression is justified where the interests of children are concerned. In doing so, they concede more than they recognize. Let me set aside the grave practical problems in a society like ours in erecting effective protections

10. LOCKHART COMMISSION REPORT, *supra* note 9, at 62. President Nixon, needless to say, roundly condemned the majority report, and it was rejected by the Senate by a vote of sixty to five. Among the five dissenters, however, were the 1972 Democratic presidential candidate, Senator George McGovern, and the present Vice President, Walter Mondale. 116 CONG. REC. 36478 (1970).

for children while still preserving the rights of adults to read, see, and hear what they wish. Let me concentrate simply on the logical implications of the concession. The state is accorded the right to intrude on communications to children, presumably on the ground that children may be harmed by such communications and are not old enough to make a reasonable judgment about running these risks. But we must note that the law allows children to be exposed, in books and films and on television, to an extraordinary array of ideas—religious, irreligious, chauvinistic, nihilistic, xenophobic, ruggedly individualistic, bleeding-heart humanitarian—take your choice. It can hardly be argued that all these ideas are safe and sane, or incapable of poisoning tender minds. Why, then, do we deny the right of the law to regulate the entire intellectual and moral diet of children, but concede its right to do so where sexual behavior and mores are concerned? The only available answer to this question that I can see is that deference is being paid to certain of the more strongly established moral principles of our society.

Nor can such protective legislation for children be justified purely on the ground that *only* the special interests of children are involved. We do not make the effort to protect minors from the seductions of sado-masochism only because they are too young to understand its risks and may hurt themselves experimenting with its techniques. We do so in the belief that torture is also bad for adults, that a general social taste for it is to be discountenanced, and that, as an educational matter, the formation and spread of that taste should be discouraged. If the law should not intrude on private sado-masochistic relations between consenting adults, this is because there are countervailing principles—for example, rights of privacy—that weigh against such a policy. It is not because the law can reasonably be expected to be uniformly neutral in regard to sado-masochism or its public expression. In sum, if intrusions on the free communication of pornographic materials are justified where children are concerned, it appears to me that we implicitly concede the validity of broad principles that libertarians seem frequently inclined to contest—to wit, that pornography is identifiable, that it has a doubtful moral legitimacy not only for children but for adults, and that, other things being equal, this doubtful moral legitimacy may justify at least some interferences with free expression.

These considerations bear on still another question raised by the use of the free speech clause to shelter the dissemination

of pornographic materials. Restrictions on speech are commonly accepted as permissible where the speech fades into conduct. But the line between "speech" and "conduct" does not draw itself, and in the case of performed pornography it is particularly difficult to draw. As Alexander Bickel asked, is *Oh! Calcutta* speech or conduct?[11] It is worth recalling that Justice Hugo Black, who thought the first amendment gave an absolute and unqualified protection to freedom of speech, concurred in a dissenting opinion in which it was declared that carrying, in a courthouse, a jacket expressing a political message in obscene language was an "absurd and immature antic . . . mainly conduct and little speech."[12] The intrusions of the law on freedom of pornographic expression where the interests of children are concerned rests in part, I believe, on the recognition that such expression, often if not always, is more than expression. It is provocation, seduction, pandering—an act and not just the espousal of an idea, if indeed the espousal of ideas has anything to do with it at all. And this brings us to an important aspect of pornography where adults are concerned.

Obviously, we must be careful not to use expressions like "provocation," "seduction," or "pandering" loosely in relation to pornographic appeals to mature adults. To do so is to deny to adults legal and moral status as autonomous beings and to raise profound problems for a system of law based on the concepts of individual liberty and responsibility. There are two respects, however, in which public pornography can be conceived of as action, not speech, and in which the protection of the rights of mature adults provides at least a threshold justification for its regulation. These two aspects are its shock effects and its intrusions on privacy.

Let me bring to my support some words of Professor Thomas I. Emerson of Yale, whose dedication to freedom of expression is not unknown:

> If an obscene communication is forced upon another person against his will it can have a "shock effect" and such a communication can properly be described as "action." . . . A communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault. The harm is direct, immediate, and not controllable by regulating subsequent action. . . . Moreover, from a slightly different point of view, forcing obscenity upon another person constitutes an invasion of his privacy, and for that reason also falls outside the system of freedom of expression. The distinction between

11. Bickel, *supra* note 3, at 27.

12. Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

> this area of conduct and the expression protected by the First Amendment touches a limited but central feature of the obscenity problem.[13]

The law does not protect me from unsolicited intrusions on my attention from people pressing political or religious literature on me that I may find disagreeable. This is because there is an established social interest in freedom of political and religious expression. Is there an analogously overriding social interest in leaflets advertising skin-flicks, topless bars, and massage parlors? Perhaps, but the case has to be made, and to make it we have to weigh the interests in conflict and make a moral judgment about their relative importance. The law gives no special first amendment protection to commercial billboards or to handing out leaflets advertising new model vacuum cleaners. My right to freedom of expression does not protect me if I accost a stranger on the street and sprinkle him with obscenities. Why does it protect me, then, if I put up a sign that presses pornographic images upon him?

These questions about public pornography and obscenity as they relate to freedom of expression carry us to the second main line of defense for freedom for public pornography. Apart from the issue of free speech, does the law have the right to regulate conduct that falls within the sphere of private tastes and beliefs? Must we not accept the principle that the law has no business regulating the conduct of adults where that conduct can be shown to involve no identifiable harm to other adults or where, if it does affect them, their consent has been obtained? Once again, we confront a principle, it seems to me, which is as much honored in the breach as in the practice.

The laws make large intrusions into the sphere of personal tastes—there are, for example, laws that make battery a crime whether or not a masochistic victim has invited it, laws that prohibit bigamy even when all the parties involved have given their consent, and laws against voluntarily entering into contracts of peonage or slavery.[14] But let us take a simpler example, and one

13. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 496 (1970) (footnote omitted).

14. Patrick Devlin, in THE ENFORCEMENT OF MORALS (1959), has explored these issues at length.

of more immediate relevance to most of us—the largely uncontested right of the state, in the interest of our health, to restrict our options and remove, for example, saccharins from the market. The normal libertarian defense of such paternalistic legislation is that it does not involve morals but is concerned with a clear and identifiable harm and that the state may legitimately act as our guardian where such indisputable harm is involved. But the trouble with this defense is that the concept of "health" is not a morally neutral concept like "height" or "weight." It is freighted with moral presuppositions.

Consider the individual who thinks that the advertising of X-rated films should be prohibited. He is likely to say that viewing such films, in and of itself, is an unhealthy act, an impairment of personality. It is a harm to the individual as immediate and dangerous as rubbing sand in his eyes or shooting heroin into his veins. To this the common response is that before we can accept the proposition that pornography is hazardous to the health we must be shown a definite correlation between the viewing of pornography and identifiable physical, psychological, or social pathologies. Well and good: there may be reasons for adopting this view of the matter rather than the Puritan's. But we must note what kind of view it is. We have not offered empirical evidence adverse to the verdict of the Puritan; we have offered an alternative definition of health, a definition that depends on rejecting the Puritan's moral presuppositions and substituting others. For if an identification of pornography with emotional impairment clearly involves a particular moral outlook, so does a point of view which treats pornography as morally and medically neutral. In general, the term "health" cannot be severed from the social and moral context in which it is used. The priestess of the Oracle of Delphi, seated over the fumes of burning drugs and babbling mysterious words, was not regarded as intoxicated or demented but inspired.

The slippage into unargued moral assertion seems to me a repeated characteristic of discussions of these issues by libertarian writers. In his critique of Lord Patrick Devlin's avowedly moralistic approach,[15] for example, Professor H.L.A. Hart's major object is to show that the law may not be used to enforce private morality as such;[16] but since Professor Hart, like John Stuart Mill before him, does not use the word "private" in this context to designate simply behavior in the solitude of one's home,

15. P. DEVLIN, THE ENFORCEMENT OF MORALS (1959).
16. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

but means instead some domain of rules and conduct that are the individual's own business whether he is in his home or in public places, the statement presupposes an antecedent moral code which gives content to the word "private" and to the distinction between "private" and "public." Similarly, what is the message conveyed by the phrase "morality as such"? Does "morality as such" mean simply a set of standards holding that certain actions are wrong independent of their specific consequences? If so, the statement that the sphere of "morality as such" is no business of the law is surely too large a formula to be defended. The law holds surreptitious entry to be wrong regardless of whether any specifiable damage is done other than the entry itself, and it takes a similar view on other matters. Or does the phrase "morality as such" refer to a set of standards defining wrong conduct that are simply offered dogmatically and without independent support? But to assign the views that some people hold about sexual conduct to this sphere of dogmatic morality is to make a judgment about their standards, a judgment that is itself put forward without argument. Moreover, the entire question whether there are actions that are intrinsically right or wrong is one of the centrally debated, and unsettled, issues in moral philosophy.

Indeed, the concept of "morality as such," dismissed by Professor Hart as outside the proper sphere of legal enforcement, creeps back into his own arguments. He asserts, to take a striking example, that existing legal prohibitions against even consensual bigamy are consistent with the principle that the law should stay out of the sphere of private moral conduct. A principal reason, he argues, is that such prohibitions are merely designed to prevent an affront to people's feelings, in other words, to prevent a public nuisance.[17] But the public exhibition of affection between members of different races can also be an affront to people's feelings in some parts of the United States, yet we should surely not wish to classify that as a public nuisance. Can the ideas of "nuisance," "public decency," and "public order" be severed from a moral judgment as to the legitimacy and worth of the offended feelings in question? I find it difficult to see how; and for this reason I am doubtful that a neat line can be drawn between people's purely personal tastes and those tastes upon which the law may legitimately pass judgment.[18]

17. *Id.* at 41.

18. *See* Nagel, *The Enforcement of Morals*, in MORAL PROBLEMS IN CONTEMPORARY SOCIETY 137, 154-57 (P. Kurtz ed. 1969).

Other illustrations of the same unacknowledged moralism can be found in the defenses of the libertarian position offered by Herbert Packer and by my Columbia colleague, and predecessor as Lockhart Lecturer, Louis Henkin.[19] Professor Packer argues that a given form of conduct should not be made subject to the criminal sanction "purely or even primarily because it is thought to be immoral."[20] We ought to know what its "bad effects" are, and these must be the secular harm it does. But he does not define secular harm. Does it mean a harm that would be recognized as a harm no matter what the observer's religious beliefs? But surely even secular observers will agree that pictures of children engaged in sexual intercourse involve a "harm" in some sense of that term, and they would maintain this view even if it could be shown that the children suffer no subsequent bad effects. The word "secular" seems to be simply a secular way of sanctifying a particular set of moral beliefs while putting other beliefs under a ban. Similarly, Professor Henkin argues that due process of law requires that legislation have a proper public purpose, and he defines this as a "rational, utilitarian social purpose."[21] But not everyone agrees—not even all rational observers—that a "rational purpose" is always a "utilitarian purpose," and in the absence of some clearer definition of what is meant, the phrase reads like a blank check. In the absence of a presupposed moral code, I am unable to fill in the missing amount.

I would emphasize that I admire the work of Professors Hart, Packer, and Henkin very much, and my own practical views are not far from theirs. But in the approach they take to the question of the legal enforcement of morality, two fundamental mistakes, it seems to me, are present. The first is the question of what is meant by "harm." The term cannot be adequately defined without moral premises, and to this extent the law cannot escape taking a moral point of view. The second is that, in the perspective they offer, it is only harmful individual conduct that is considered pertinent to the discussion: as they see the matter, some clear correlation has to be established between, say, pornographic displays and the encouragement of undesirable individual conduct. But this approach misses one of the central functions

19. Professor Henkin delivered the Lockhart Lectures on April 28-29, 1976, at the University of Minnesota Law School. For the text of the lectures, see Henkin, *Constitutional Fathers—Constitutional Sons*, 60 MINN. L. REV. 1113 (1976).

20. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 267 (1968).

21. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 402 (1963).

of anti-pornographic legislation—protection of society's norms by giving adequate instructions to all members of society about what that society approves and disapproves. In the words of Louis B. Schwartz, "The interest being protected is not, directly or exclusively, the souls of those who might be depraved or corrupted by the obscenity, but the rights of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront."[22] The fault, in short, is in trying to discuss individual rights and liberties independently of any consideration of larger public purposes and, specifically, a public interest in the moral environment. The argument presupposes precisely the principle that has to be explicitly defended—namely, that a public interest in the moral environment is *prima facie* illegitimate, irrational, or "non-utilitarian."

Public pornography causes economic damage; it spawns crime and ugliness; it thrives on the victimization, by drugs, duress, and other means, of many of the persons directly involved. But even if, despite all this, we accept the characterization of public pornography as "victimless," fundamental questions remain. We have laws against cockfighting. Can we say that the reason for these laws is simply that the suffering of roosters is a secular harm that outweighs the human pleasure derived from the spectacle? I take it that we are doing more than this; we are passing an adverse judgment on the nature of that pleasure. We do not, after all, have laws against fishing. It is the norms of a society that we are enforcing, secular or non-secular, utilitarian or non-utilitarian. Again, we have laws against bareknuckle prize fighting. How many of us would be willing to permit such fights provided only that the fighters consented and were amply rewarded? Clearly, there are some moral norms we wish to enforce whether or not there are dissenters, and whether or not the element of consent is present.

What, then, puts pornographic displays in a compartment of their own? In the great majority of cases they involve the degradation and depersonalization of the individuals involved, and—a point not unnoticed by feminists—in most cases these individuals are women.[23] Surely no one will say that spectacles

22. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 681 (1963).

23. I quote the report of a respected film and theater critic who has seen a representative sample of X-rated films: "[E]ssentially those films seem to me acts of vindictiveness by men against women in return

of this sort—whose existence and character are forced on the attention of anyone who walks on the streets of our central cities or reads our newspapers—are congenial to the moral sensibilities that we should like to be dominant in our society. The question, then, is why they should be exempt from regulation. And the answer cannot be, if my remarks to this point have any validity, that the law has no business regulating morality. The option of moral isolationism is not available to it.

But I ask this question as an open question. Let me now turn to the other side of the issue. A minority of the Commission on Pornography and Obscenity stated its disagreement with the majority report in the following words:

> The basic question is whether and to what extent society may establish and maintain certain moral standards. If it is conceded that society has a legitimate concern in maintaining moral standards, it follows logically that government has a legitimate interest in at least attempting to protect such standards against any source which threatens them.[24]

I agree with the first clause in the second sentence of this statement. But I do not at all believe that the second clause "follows logically" from the first. It would follow only if there were no other legitimate interests that were countervailing. The collision of otherwise legitimate interests is one of the simple reasons why law and morals in general are not geometrical sciences.

There is, first of all, the simple but weighty consideration of economy. The law's resources are limited. It is true, as Lord Patrick Devlin argues, that a society is in part a community of belief in certain moral ideas.[25] But it is not true that an attack on any one of these ideas is akin to an attack on the necessary foundations of society. A general indifference to pornography does mean, I believe, the disappearance of feelings and relationships of great importance in our lives. But the law has many things to do, and it almost certainly cannot make a concerted

for the sexual restrictions and taboos of our society and for the cruelties of women toward men that those restrictions have produced. The vindictiveness is essentially mean-spirited and exploitative." Kauffman, *On Pornography: II. Dissenting and Concurring Opinions*, 22 PUB. INTEREST 28, 31 (1971).

24. LOCKHART COMMISSION REPORT, *supra* note 9, at 457 (statements by Morton A. Hill and Winfrey C. Link, concurred in by Charles H. Keating, Jr).

25. DEVLIN, *supra* note 15, at 10-11.

effort to stamp out pornography without neglecting other social evils of even more urgent importance.

Moreover, other serious evils are likely to follow from the effort of an overburdened legal system to enforce prohibitions against activities for which, obviously, there is a strong public demand. As the history of Prohibition indicates, the enforcement of such prohibitions usually becomes highly selective. The vice of legal arbitrariness rears its ugly head. Moreover, as Professor Packer has pointed out,[26] when even a limited number of people have a strong urge to engage in an activity, legal prohibitions against it tend to produce a "ripple effect" of illegality. This has been the case with gambling and the banning of marijuana as well as with restrictions on pornography. Running such risks is perhaps reasonable where there is a widespread public consensus that, despite the strong addiction of some to the condemned activity, it is a clear-cut social evil. But in the case of pornography, as in the case of gambling and marijuana, that consensus is unclear. There is large, though by no means universal, agreement that pornography is deplorable. But with regard to whether it is a serious enough social evil to warrant legal efforts to stamp it out, the consensus is patchy at best. And it becomes even patchier when severe criminal penalties are imposed on offenders. No matter how morally wicked the offenders may be thought to be, they may tend also, in our society, to be regarded as victims of a punishment that does not fit the crime. Thus, the enforcement of severe laws against pornography may well produce an effect opposite to that intended. It may induce a perception of those who are punished as martyrs and thus reduce, not reinforce, the perception of pornography as a serious evil.

We come here, I believe, to one of the fundamental issues affecting the legal enforcement of morality. It is one thing to say that a society has the right to enforce—and indeed cannot avoid enforcing—moral norms that are felt intensely and about which there is very general agreement. Despite widespread deviations from the norm of monogamous marriage, for example, and despite unfavorable views of the norm itself that have been put forward by a number of contemporary sociologists—one treatise notes it may come to be viewed as "a form of emotional and sexual malnutrition"[27]—it would be surprising, and I think deplorable, if the

26. H. PACKER, *supra* note 20, at 359.

27. BEYOND MONOGAMY: RECENT STUDIES OF SEXUAL ALTERNATIVES IN MARRIAGE 34 (J.R. Smith & L.G. Smith eds. 1974).

laws did not provide in a variety of ways preferential treatment to the institution of monogamous marriage. But it is another thing to enforce moral norms that are the subject of considerable dissent. This can aggravate the dissension and put minorities at the mercy of tyrannical majorities. As I have indicated, I am not persuaded by the argument that we should not take "moral harms" into consideration unless they can also be shown to be "secular" or "utilitarian" harms. But the instinct behind these cautions is a sound pragmatic one. Where the regulation of people's moral behavior is concerned, it is usually prudent policy to seek the widest, least tendentious basis for agreement before plunging into the difficult and socially disruptive task of regulating the morals of some to satisfy the preferences of others.[28]

But this is a pragmatic consideration, as are all the others I have put before you. Is there also a reason not simply of high expedience but of higher principle that weighs against the prohibition of public pornography? Well, reasons of high expedience, as John Stuart Mill observed, are not easily distinguished from reasons of principle. Still, there does seem to me one consideration that everyone will recognize as a consideration of principle. It is a just claim upon a legal system—and an expression of what I take to be a fundamental moral norm of our society—that individuals be given fair and reasonably clear advance notice of the kind of conduct that can subject them to legal penalties. That obscenity and pornography laws often fail in this regard will not be news. A film by Walt Disney containing a scene of a mother buffalo giving birth in a snowstorm was once banned in Chicago.[29] Nor can the Supreme Court's search for an operable definition of obscenity be said to have met with success. As Justice Harlan once observed, "the subject of obscenity has produced a variety of views among the members of the Court unmatched in . . . constitutional adjudication."[30] The late Justice Black's words, in his dissenting opinion in *Ginzburg v. United States*,[31] are even more poignant: "[N]ot even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case . . . whether certain material comes within the area of 'obscenity' as

28. Of course, this presupposes that individuals adversely affected by the moral behavior in question can exercise some reasonable measures of self-protection. We cannot wait for a consensus on the moral legitimacy of racial equality before taking action.

29. For this and other examples, see H. ABRAHAM, FREEDOM AND THE COURT 175-76 (2d ed. 1972).

30. Interstate Circuit v. Dallas, 390 U.S. 676, 704-05 (1968).

31. 383 U.S. 463 (1966).

that term is confused by the Court today."[32] The problem of definition is fundamental and it is not easy to solve. Justice Potter Stewart has said that he knows hard-core pornography when he sees it,[33] but unless we can arrange to have him present on every occasion when people are deciding whether they are breaking an obscenity law, his pronouncement does not do us much good. The reason of principle that weighs most heavily against obscenity legislation is due process of law. The due process clause much more than the free speech clause is the source, in my view, of reasonable hesitations regarding the regulation of pornography.

Nevertheless, it would be a mistake to conclude that absolutely nothing can or should be done. In relation to performed or photographed pornography—the most obtrusive kinds of pornography—I am inclined to think it is possible to write statutes that will indicate with reasonable precision what is meant by pornography in the legal sense and that will not bring statues by Michelangelo, erotic drawings by Picasso, or plays like *Marat/Sade* under the axe. Admittedly, in different areas of the country, there will be differences of opinion about what should be defined as "pornographic." Provided that constitutional guarantees of due process are met, this seems to me simply an argument, at any rate in the case of films, photographs, and live entertainment, for leaving the options to states and municipalities.

Nor is placing pornography under a ban the only option. There is the alternative strategy of simply zoning pornography.[34] This is sufficient to accomplish what I believe are the two main and defensible functions of antipornography legislation: first, the protection of the rights of the unwary and the unwilling to use the public thoroughfares without being psychically assaulted; second, the assertion of the public bias in favor of certain moral ideas. There was a time when people with allergies to tobacco smoke had their interests subordinated to those of

32. *Id.* at 480-81.

33. Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring).

34. The Supreme Court approved a zoning scheme that required dispersal of "adult" motion picture theaters in Young v. American Mini-Theatres, 427 U.S. 50 (1976).

smokers. The balance has been shifted. A similar rationale can be used to shift the balance with regard to pornography. It may be futile and foolish to seek to stamp out pornography, but it is not futile or foolish for a society to seek to signal its preferences through its laws. Not all legal restrictions, after all, can be explained as efforts to abolish the conduct at which they are aimed. Laws against incest or suicide, or taxes on gambling, can certainly not be justified in this way. They are expressions and reinforcements of a moral code, cues to the young, the confused, and the disoriented about society's feelings and beliefs.

It may be said that measures of this sort directed against pornography will be disruptive. But the spread of unregulated commercialized pornography has been deeply disruptive. It will be said that pornography is hard to define, that its immorality is debatable, and that, in fact, it is a subjective phenomenon existing only in the eye of the beholder. I find these replies less than convincing. Whatever its standing under the free speech and due process clauses, obscenity has legal recognition. There are, for example, well-known gestures which everybody recognizes as obscene, which are understood to be insulting and aggressive, and which, if used, remove a man's right to say that he has been the victim of unprovoked assault. Nor are the norms defining pornography and obscenity entirely dependent on individual points of view. There is all but universal agreement, for example, that bestiality and pedophilia are obscene.

To be sure, I am aware of the position—who in our society today could not be?—that the belief in the immorality of pornography is a reflection of an ugly Puritanism and that it is held by people who have "difficulty accepting their own sexuality."[35] But this is a speculative argument and an *ad hominem* one; like most such arguments it can be turned against those who make it. Such evidence as we have suggests, at the very least, that those who purvey or regularly seek pornography are suffering from the same ailment. Nor do the conventional arguments that pornography is harmless meet the point. It can be said that pornography "seems to provide a relief rather than a stimulant,"[36] and that it cannot be shown to be a causal agent in sexual assaults or other socially undesirable behavior. But even if we should grant the truth of these propositions, they ignore two of the

35. Etzioni, *Porn is Here to Stay*, N.Y. Times, May 17, 1977, at 33, col. 2.

36. *Id.*

basic issues under debate. First, unlike pornographic words, pornographic pictures and performances exploit living people, including children. Second, the prevention of specific individual crimes is not the only concern of those who find public pornography a disturbing phenomenon. They are equally concerned with the brutalizing effects on public tastes and the public environment of the genial tolerance of commercialized sexual, sado-masochistic, and exhibitionist performances, and with its impact on social norms.

But what about these norms and the impact upon them of public pornography? Is public pornography sufficiently important to merit even the minimal attention by the law that I have been considering? This, of course, is the ultimate issue, and to examine it, we must give a moment's attention to the social significance of obscenity. I see little value in the studied, leering exploitation of the obscene, but I believe there are redeeming social values in obscenity itself. It is neither an unqualified evil nor a mere ripple of eccentricity on the surface of social relations. It serves an important purpose, but in order to serve this purpose it needs a corpus of reasonably firm norms against which to operate.

All societies and most individuals require escape hatches from the mores and rules. Indeed, human customs usually make explicit provision for breaking rules. They establish special rules declaring that, given certain conditions, violations of the rules are permissible. This is conspicuously the case with sexual and religious mores. Carnivals, *danses macabres*, the story told in a whisper, court jesters, beloved life-giving mischief-makers like Pan, Puck, and Harpo Marx, are well-nigh universal in human cultures. The obscene is an escape hatch. Just as there are moments when nothing but a blasphemous oath will satisfy the needs of expression, so there are occasions when the sanctities veer into the sanctimonious, and everyone can breathe more easily because the conventions have been broken and someone has uttered a forbidden thought or given vent to feelings ordinarily suppressed. Aristophanes, Rabelais, Shakespeare, and D. H. Lawrence, all of them authors of works in which there are passages that can be called obscene, are benefactors of mankind.

But if what I have just said has any validity, there are two categories of obscenity—the one permissible, even desirable, the other impermissible and undesirable. Under certain conditions, words, images, or acts otherwise prohibited lose their stain. They are still surrounded with taboos, but because the appropriate

conditions of form, context, time, and circumstance are met, the breach of the taboo is sanctioned. Thus, part of Aristotle's argument in his *Poetics* against Plato's proposals for censoring the arts consists of his effort to show that Plato ignores the special conditions that, in an integrated work of art, make otherwise blasphemous or obscene utterances therapeutic and useful in the education of the individual and the governance of a good society.[37]

Often we do not use the word "obscene" for such permitted violations of the norms. Legal efforts to define "obscenity," for example, are usually intended to remove such permitted violations from the category of the obscene. But whether or not we use the word "obscene" to characterize them, it is plain that they inhabit a half-world in between what social norms prohibit and what these norms encourage, a world with its own special rules. This is the difficulty that obscenity presents from the standpoint of the law. For while some of the rules are fairly well understood, others are much more difficult to articulate. Specialists in the arts and literature disagree about them, and censors, juries, and judges can hardly be expected to be sophisticated about them.

This is why prudence is called for in the legal regulation of obscenity. Undeniably, there is a "slippery slope" problem—anti-pornography legislation easily becomes a vehicle of expression for prigs, philistines, and prudes. But as Holmes once remarked, "people in the law as elsewhere hate to recognize that most questions—I think I might say all legal questions—are questions of degree."[38] And he went on to add: "I have just sent back an opinion of one of our JJ. with a criticism of an argument in it of the 'where are you going to draw the line' type—as if all decisions were not a series of points tending to fix a point on a line."[39] There is a solid social reason, I suggest, for minimal efforts to place pornography under legal regulation. Such efforts draw the line, and the line is necessary if the obscene is to serve its purpose. For it acquires its value only in relation to the accepted sanctities that it challenges. If the obscene becomes conventional, this is at the price of such sanctities. And if someone says that the obscene lies in the eye of the observer, that there is no form of expression or conduct which, in a given society, can objectively be declared obscene, and that nothing of value is lost in thus entirely subjectivizing the concept of obscen-

37. *See generally* THE POETICS OF ARISTOTLE (D. Margoliouth ed. 1911), and especially ch. 25.

38. 2 HOLMES-POLLOCK LETTERS 28 (M. Howe ed. 1941).

39. *Id.*

ity, we may take it that he sees no point in the existence in society of the belief that some areas of human relationships are peculiarly precious. But few people, when they reflect on the matter, are ready to take such a view.

It may well be that there is no firm statistical correlation between exposure to erotica and a penchant for rape, but the more significant issue to pursue—and the statistical methods or constructed experiments of social scientists are unlikely to reach this issue—is whether there is a difference in the behavior and interests of people reared in cultures where the line between the sacred and the obscene is clear and the behavior and interests of people reared in cultures where the line is vague or nonexistent. Does anyone believe that the churches, the images of the Virgin, the ubiquity of Christian themes and symbols, had no effect for better or worse on the ideas about life and morality of medieval men and women? Can it be believed that the all but ubiquitous externalization of the interest in a depersonalized and cruel sexuality conveys to contemporary men and women no message comparable in force about the proper preoccupations and goals of the human adventure?[40] The rituals and entertainments of a people are recognized in all societies as carrying a symbolic and educational force. The law recognizes this fact in the controls it exercises over games. That it should be entirely indifferent to pornographic spectacles is inconsistent with this general attitude.

But if the law has moral purposes, in what manner can it define and defend these purposes? I will discuss this difficult question next.

II. THE RELATIONSHIP OF THE LAW TO HIGHER MORAL PRINCIPLES

It seems to me peculiarly illuminating to examine the relationship of the law to higher moral principles if one seeks an understanding of the role of law as a department of human

40. Harry Clor has written:

> People are influenced by what they think others believe and particularly by what they think are the common standards of the community. . . . The free circulation of obscenity can, in time, lead many to the conclusion that there is nothing wrong with the values implicit in it—since their open promulgation is tolerated by the public. They will come to the conclusion that public standards have changed—or that there are no public standards. Private standards are hard put to withstand the effects of such an opinion.

H. CLOR, OBSCENITY AND PUBLIC MORALITY 170 (1969).

civilization. To set the stage for my examination of some of the issues presented—I can, of course, only examine a few—let me begin with some general observations extending my previous remarks about the role of law in the enforcement of morality.

(1) The law is concerned, among other things, with the behavior of individual members of society insofar as that behavior adversely affects other individuals. Even when it operates within this limited perspective, however, the law inevitably makes moral discriminations; it makes distinctions between kinds of harm it tolerates and kinds of harm it does not. Thus, a business whose aggressiveness and efficiency force other enterprises out of business has harmed the other enterprises. Nevertheless, assuming that its methods have been honest and that it has operated within the principles of fair competition, this harm is accepted by the law in deference to economic efficiency and the presumed utility of vigorous competition in promoting that efficiency. Implicit in such a posture, it should be evident, are certain presuppositions about relative values. We may agree with these presuppositions or not, but the law cannot avoid being controlled either by these or by others. Accordingly, even when the law restricts its attention to the harm that individuals may directly do to others, its attention is inescapably selective, and the principles of selection reflect antecedent moral views.

(2) The law does not—and cannot—confine its attention simply to the direct harm that one individual's behavior may cause other individuals. It cannot help but be concerned with the indirect effects of individual conduct, exerted through the impact of conduct on general norms of behavior. For the strength or weakness, clarity or vagueness, of these norms has an influence on the general tone of society and on the horizons, opportunities, and handicaps of its individual members. The law in fact takes sides regularly, serving as a general instrument of moral education. It gives symbolic expression as well as legal sanction to certain moral values and helps to create not simply habits of behavior but habits of critical assessment of behavior that make these values part of people's internal systems of self-regulation. The tax laws, the civil rights laws, the indisposition of the courts to enforce wagering contracts, the use of concepts like "unconscionable" and "equitable" all have this side effect. There is, to be sure, a sense of the term "neutral" which permits us to say, as Professor Herbert Wechsler has argued,[41] that a

41. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

distinguishing feature of judicial reasoning is the search for neutral principles. But these principles, as Professor Wechsler has made plain, are not *morally* neutral. Although they are higher principles whose significance and validity transcend the case at hand, they may well throw the weight of the political and legal system behind one set of controverted social claims as against another. The neutrality of the law is like the fabled neutrality of the Irishman who, during World War II, said "We're neutral, but the question is, neutral against who?"

Only a highly formalistic jurisprudence—a jurisprudence controlled by the kind of black letter myopia against which the legal realists railed—will ignore this larger moral and educational role of the law. Indeed, many of the distinctive procedures of the law represent in themselves a divergence from, and an implicit critique of, traditional moral attitudes. Their latent educational function is the evocation and espousal of moral attitudes deemed to be superior. That is the interpretation of the function of law offered by Aeschylus in the *Oresteia*, in which he depicts Athena descending from on high with the gift of justice and intervening to replace the traditional code of vendetta and revenge with a legal system's methods of adjudication and compensation. The influence of the courts in educating society in more enlightened notions of fairness was much emphasized by Justice Brandeis, and even so happy a demystifier of the law as Thurman Arnold described the judicial trial as "the way in which society is trained in right ways of thought and action, not by compulsion, but by parables which it interprets and follows voluntarily."[42]

(3) Recognition of the moral functions of the law is particularly important today. We are all products of a searing historical experience, extending over many centuries, and violently resurgent in the contemporary world, in which governments and states have taken the condition of the souls of their subjects as a major concern and expended more effort seeing to it that they professed approved ideologies than that they lived in conditions of minimal physical decency or social justice. You will inevitably share, as I do, John Stuart Mill's fear that if the law takes the guardianship of morals to be its proper sphere, human individuality and human liberty may be crushed. I think this fear is real, not fabricated. But there are other policies calling for reasonable fear as well.

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42. T. ARNOLD, THE SYMBOLS OF GOVERNMENT 129 (1935).

Protesting against paternalistic legislation designed to protect the morals of the members of society, Mill wrote, "If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences."[43] Given society's great powers of education, he argued, given the authority of established opinion and the natural penalties like condemnation and derision which fall on those who deviate from the norms, society ought not to pretend that it also needs "the power to issue commands and enforce obedience in the personal concerns of individuals . . . ."[44] But when the powers of schools, established opinion, and accepted mores fade, when large and conspicuous parts of the environment work against the influence of family and a society's declared standards, we cannot easily defend the proposition that society may absolutely not use the law to deal with the causes or results of this decay in the traditional agencies of moral education. If we do, we are shoving the problem off on an abstraction, "society," on which we blame the existence of the problem, while preventing society, in a concrete fashion, from using one of the few instruments that may be available to it.

(4) But the law—at any rate, the law in a free society—faces serious limitations in its ability to enforce moral norms. It cannot invade people's homes, or exercise tyrannical methods of thought control, or impose the attitudes of the majority on a minority without compelling reasons. In particular, it is limited by the requirements of due process. Morals legislation is peculiarly susceptible to the vices of imprecision and arbitrariness. Moreover, morality involves matters of highly individualized judgment in highly individualized contexts, in relation to which the instruments of the law are often blunt or cruel.

(5) Nevertheless, the law is not without powers of more subtle adjustment to the peculiar issues presented by its function as moral arbiter and guide. It need not take sides on the issues at every point. To take an example—I offer it without comment pro or con—the law can refrain from granting homosexuals the right to marry their sexual partners, but it can also decriminalize homosexuality and tolerate public arguments in its favor. The legal system's purposes are not restricted to the prohibition of what it disfavors, and its means are not limited to

43. J.S. MILL, *supra* note 5, at 101.
44. *Id.* at 102.

those of the criminal law. Its purpose can be simply that of signalling and reinforcing a moral bias, and to carry out this purpose it can use tax laws, zoning laws, education laws, public policies in employment, housing, and urban planning, and judge-made laws in the fields of contract and torts, to name only a few of the devices available to it.

(6) In fulfilling this role, which it cannot escape, as a moral arbiter and guide, the legal system in a free society faces a fundamental philosophical issue. It cannot help but reflect the moral traditions of the community in which it functions. But where these moral traditions are diverse, it has either to make a choice among them or decide, on some sort of rational ground, that it should keep at arm's length. Moreover, there may be some moral attitudes well established in a community and shared by the overwhelming proportion of its members which the legal system must not support and may indeed be under an obligation to combat. How, then, can the law decide which of the moral standards of a community it should accept and enforce or encourage, which it should be neutral towards, and which, if the necessity arises, it must resist?

To answer this question, the law needs some conception, however incomplete and unfinished, of its commanding moral purposes, and it is to the exploration of such a conception that I now turn. I wish to ask how, if at all, the law can receive guidance in the performance of its moral role. Are there principles inscribed in human reason and nature that will perform this guiding task? Are there notions inherent in the idea of law itself? Is the concept of fundamental human rights perhaps a clue to the manner in which the law should exercise its inescapable moral responsibilities?

Let me turn first to the notion that an examination of human reason and nature will yield the higher moral principles that we seek. This is the doctrine of Natural Law. No more lucid or influential interpreter of this doctrine has lived than St. Thomas Aquinas, who describes Natural Law as follows:

> [T]here is in man a natural and initial inclination to good which he has in common with all substances; in so far as every substance seeks its own preservation according to its own nature. Corresponding to this inclination, the natural law contains all

> that makes for the preservation of human life, and all that is opposed to its dissolution. Secondly, there is to be found in man a further inclination to certain more specific ends, according to the nature which man shares with other animals. In virtue of this inclination there pertains to the natural law all those instincts 'which nature has taught all animals,' such as sexual relationship, the rearing of offspring, and the like. Thirdly, there is in man a certain inclination to good, corresponding to his rational nature . . . . So man has a natural inclination to know the truth about God and to live in society. In this respect there come under the natural law, all actions connected with such inclinations: namely, that a man should avoid ignorance, that he must not give offence to others with whom he must associate and all actions of like nature.[45]

What inescapably strikes the attention in this classic account of Natural Law is the equivocal character of what it communicates. St. Thomas speaks of human inclinations and at least some of the inclinations he describes are universal facts. It is impossible for any normal human being, for example, not to have sexual inclinations. But some of the inclinations St. Thomas ascribes to man are surely not invariable—for example, the inclination to rear offspring. And some, like the inclination to live in society, can coexist with inclinations to perform actions not in conformity with what St. Thomas declares to be a natural law—for example, the obvious inclination that some people have to give offense to other people with whom they must associate. In brief, there are two meanings of "law"—law as a *description* of observed regularities and law as a *norm* directing individuals to certain kinds of action. If "Natural Law" is descriptive law, there is no need to counsel human beings to follow it; if it is normative, they are clearly free to break it. And the problem in Natural Law is to explain why descriptive statements about human inclinations are evidence for the validity of normative directives about them.

There is a sense, of course, in which statements of fact are logically relevant to decisions about how people ought to behave. If you don't want to risk broken limbs, don't defy the laws of gravity by spreading your arms and attempting to fly from one roof to a roof thirty yards away. If you wish to work at peace with other people, don't give them needless offense. Because most of us share such desires, the obedience to such rules seems to us "natural" and mandatory. But we must note that our obligation to live by such rules is, from a logical point of view,

45. AQUINAS, SUMMA THEOLOGICA, Qu. 94, Art. 2, conclusion (J.G. Dawson trans.), *reprinted in* LLOYD, INTRODUCTION TO JURISPRUDENCE 72 (1959) [hereinafter cited as SUMMA THEOLOGICA].

purely hypothetical. It depends on our being interested in attaining the ends to which observance of these rules is a means.

Accordingly, if Natural Law is to give us categorically binding ends, it can only do so by supposing, first, that the universe is teleologically organized and, second, that there is a categorical moral imperative commanding man to pursue the ends this teleology sets for him. But no such imperative can be derived from a teleology that is merely descriptive, and the question for the advocate of Natural Law is how he arrives at a prescriptive teleology. Although certain general ends, for example, the goal of self-preservation, are shared by most people, these ends are broad and leave immense room for variation within them. The need for food, for example, can be satisfied by cannibalism; the need to rear offspring can be met by polygamy, polyandry, or the abolition of the family and the creation of public institutions for the care of children. The adherent of Natural Law tells us very little unless he tells us which of these ways we ought to adopt as the "natural" way, and he cannot tell us this only by invoking our universal "inclinations."

The mixture of the descriptive and the normative, together with the ineradicable vagueness of all assertions to the effect that man has certain natural ends or goals, represent an insoluble problem, so far as I can see, for the Natural Lawyer's effort to deduce basic moral laws from the universal facts of human nature alone. Thus, the eminent twentieth century Thomist, Jacques Maritain, has written:

> [M]an possesses ends which necessarily correspond to his essential constitution and which are the same for all—as all pianos, for instance, whatever their particular type and in whatever place they may be, have as their end the production of certain attuned sounds. If they do not produce these sounds they must be tuned or discarded as worthless.[46]

But this is not so. They can be cut up and used as firewood, as soldiers in the field have been known to use them. They can be used for this "unnatural" purpose even if they are capable of producing the sounds for which their designers intended them. It is not from our natural ends that we learn that we must, for example, forego abortion. It is from the specific and indispensable interpretation of these ends by particular people or moral traditions. But the claim these people or traditions may make to exclusive understanding of the Word of Nature is not self-certifying.

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46. J. MARITAIN, MAN AND THE STATE 86 (1951).

Moreover, Natural Law is not quite, I think, what it seems to be. One of its obvious appeals is that, at least for those who accept the doctrine, it provides what seems to be a system of absolute, inviolable laws. It removes us from the realm of the contingent, the hypothetical, the experimental, the doubtful. But is this really so? St. Thomas, at any rate, was too judicious to think so. He said that so far as the general principles of reason are concerned there is one standard of truth or rightness for everybody. But he added:

> When we come to the particular conclusions of the practical reason, however, there is neither the same standard of truth or rightness for everyone, nor are these conclusions equally known to all. All people, indeed, realize that it is right and true to act according to reason. And from this principle we may deduce as an immediate conclusion that debts must be repaid. This conclusion holds in the majority of cases. But it could happen in some particular case that it would be injurious, and therefore irrational, to repay a debt; if, for instance, the money repaid were used to make war against one's own country. Such exceptions are all the more likely to occur the more we get down to particular cases . . . . The more specialized the conditions applied, the greater is the possibility of an exception arising . . . .[47]

This is an astute account of the way in which rules of law and morals are reinterpreted and reconstructed in the course of their everyday application to specific cases. But it can give no comfort whatsoever to those who seek in Natural Law relief from the problems of relative values and the balancing of interests. The fact is that, Natural Lawyers or not, people rarely argue seriously about general moral principles such as whether debts should be repaid. They argue about whether a debt is legitimate, or whether specific conditions are present that excuse or oblige nonpayment. In the application of general principles to particular cases we return to our human, fallible, and often idiosyncratic judgments, and Natural Law offers us little guidance. The search for higher moral principles that will be of help in determining how the law should discharge its responsibilities is not satisfied, I believe, by resort to this doctrine.

. Another effort to find such principles consists in looking to law itself and extracting the needed principles from its essential

47. SUMMA THEOLOGICA, Qu. 94, Art. 4, conclusion, *reprinted in* LLOYD, *supra* note 45, at 73.

purpose. One of the most ingenious and probably best-known efforts of this sort is that of Professor Lon Fuller.[48] There is, he argues, an "inner morality" of the law, a "morality that makes law possible." This inner morality has eight parts.[49]

First, the law must consist of rules; otherwise it is not law but a procession of ad hoc decisions. Second, the law must be publicized. The affected parties must know the rules they are expected to observe. Third, the rules must be prospective, not retroactive; if this maxim is violated, the law will not be a usable guide to decision and action. Fourth, the rules must be understandable; again, the purpose of the law as a guide to decision necessitates this characteristic of law. Fifth, and for the same reason, the rules of the law cannot be contradictory. Sixth, they cannot require conduct beyond the powers of the affected party. Seventh, the laws cannot be so frequently changed that the subject cannot orient his action by them. Eighth, there has to be a congruence between the rules as announced and the rules as they are administered. Otherwise, once again, the law will not be a safe and sound basis for deciding how to behave.

"A total failure in any one of these eight directions does not simply result in a bad system of law," says Professor Fuller, "it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[50] But I confess that I find these eight maxims, together with the characterization of their importance which I have just quoted, somewhat perplexing.

Let me ask, first, why a system of rules which fails in one or another of these ways cannot be called a system of law, except in a Pickwickian sense. Let us suppose that coercive sanctions are attached to its rules, that specifiable officials are empowered to interpret these rules and apply the pertinent sanctions, that there are also rules for deciding conflicts and doubts and for changing the rules, and that the inhabitants of the territory to which these rules are applied generally, even if not invariably, act in obedience to this system. This is a rough but conventional definition of a legal system which I should wish to refine in a number of ways, but it will do for our present purposes. What are the reasons for regarding such a definition

48. *See* L. FULLER, THE MORALITY OF LAW (rev. ed. 1964).
49. *Id.* at 46-91.
50. *Id.* at 39.

as insufficient and adding the characteristics on which Professor Fuller insists? I am afraid I do not see any, especially in view of his declaration that departure from any one of his eight conditions disqualifies a system as a legal system.

Legal systems have made it a crime for people not to believe in the officially sanctioned God, surely a requirement that lies beyond the power of an unbeliever. Shall we say that they were not legal systems for this reason? The edicts of Hitler and Stalin were often ad hoc and sometimes, in order to spread terror, deliberately unpublicized. It is, at the very least, an abuse of common usage to say that, for this reason, Nazi Germany and Stalinist Russia had no legal systems. The rules of the Internal Revenue Service are surely not easily understandable. Do they lose their legal status for this reason? And administrative law in general is the scene of rapidly changing regulations, yet it is disconcerting to be informed that the Securities and Exchange Commission or the Department of Health, Education, and Welfare is not an agency of the law.

To such objections it might be said, as Professor Fuller suggests in some of his arguments, that where the law falls short of the ideals he describes, it is only law in a half-way world, law pointing towards goals it has not fully achieved, like a sapling on the way to being an oak tree. A legal system, as he says, is an "enterprise," and, in his words, "both rules of law and legal systems can and do half exist."[51] But this requires us to reserve the word "law" in its full meaning only for ideal legal systems that exist nowhere. It is, in effect, a prescription to remake our language, and to use the word "law" only eulogistically. If we follow this prescription we shall, however, have to find a new word to describe the imperfect systems we have and to distinguish them from other kinds of codes like conventional morality, primitive custom, or the rules of a country club. We shall be right back where we are now, in other words, except that we shall be encumbered by the obligation—which probably lies beyond our powers of fulfillment—to remember that an ordinary English word may not be used in its ordinary way. Professor Fuller asserts that "[t]his inconvenience may . . . be offset by the capacity of such a view to make us perceive essential similarities"[52] between the legal enterprise and other rule-making enter-

51. *Id.* at 122.
52. *Id.* at 129.

prises. But it is surely possible to detect these similarities without creating a new vocabulary. We do not have to call a mouse half a rat in order to notice that the two animals have traits in common.

Indeed, let me approach Professor Fuller's suggestion from quite the opposite point of view. He argues that the eight conditions he describes, though based only on an examination of the inner character of law itself, nevertheless constitute a "morality" in the peculiar sense of that word. This is because, in his words, there is a

> view of man implicit in the internal morality of law. . . . To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.
>
> Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent.[53]

I can only say that though I may be revealing my own inadequacies, I cannot extract a distinctive view about the dignity of man from a review of the principles that Mr. Fuller holds to be constitutive of the law's inner morality.

With which of these principles could we break and train a dog efficiently?[54] You cannot train a dog by ad hoc reactions to his behavior, or by keeping your demands on him secret from him, or by enforcing retroactive rules, or being unintelligible, or issuing contradictory commands, or asking him to do what lies beyond his powers, or changing the rules rapidly, or not keeping your word and denying him his bone when you've promised it. I do not mean, in drawing this analogy, to deny the dignity of man. I do not, for that matter, mean to deny the dignity of dogs, for many of whom I have affection and for some of whom I have learned to have great respect. I mean only to convey the thought that the inner morality of the law of which Mr. Fuller speaks in such high terms is only a set of homely and hardly recondite instructions for teaching any creature capable of learned behavior. Why these principles should be called, eulogistically, a "morality" I am at a loss to say, and I do not believe

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53. *Id.* at 162.

54. I owe this canine analogy to my colleague, Professor R. Kent Greenawalt.

they are sufficient to support the high ethical commitments which Mr. Fuller seeks to build on their foundation.

Let me now turn to a third and final example of an effort to establish the content of the moral obligations of the law—a final example, that is, before I put my own head on the block and offer some suggestions of my own. This effort is by far the most popular at the present moment and has stimulated a major redirection of thought and attention not only in jurisprudence and social philosophy but in many other fields such as sociology and economics. I speak, I probably need not say, of the revival in contemporary form, properly reinforced by decision theory and techniques of analytic philosophy, of the classic liberal social contract and natural rights theories. Professors John Rawls[55] and Robert Nozick,[56] both of Harvard, are perhaps the best-known representatives of this revival. In jurisprudence, Professor Ronald Dworkin[57] is a prominent spokesman for a similar revival, and it is probably natural that, at the moment, he too is at Harvard.

I have discussed the ideas of Professors Rawls, Nozick, and Dworkin at other times,[58] and I shall not repeat what I have said. I must emphasize, too, that Professors Rawls and Nozick disagree with each other on a number of fundamental issues and that Professor Dworkin, though he has been explicit in urging the truth and significance of what he believes to be the essence of the classic liberal philosophy, has carefully stopped short of saying that he is restating either social contract or natural rights theory. Accordingly, what I propose to put before you is a position which I shall not attribute to any of these scholars. It seems to me in harmony with much of what they say, but I offer it as a hypothetical case study useful in its own right and with some relevance to the present reexamination of the resources of the social contract tradition.

55. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971).

56. *See generally* R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

57. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977), and especially pp. xiv-xv and chs. 2, 3, 7, 12, & 13.

58. *See* Frankel, *The New Egalitarianism and the Old*, 56 COMMENTARY 54 (Sept. 1973); Frankel, *Political Disobedience and the Denial of Political Authority*, 2 SOCIAL THEORY AND PRACTICE 85 (Spring 1976); Frankel, Book Review, 5 COLUM. HUMAN RIGHTS L. REV. 547 (1973) (RAWLS, A THEORY OF JUSTICE).

Let us create an imaginary experiment for ourselves. How would people think, what rules would they be prepared to accept as just, if they were disengaged from their historical heritage and existing social surroundings and placed in conditions in which their disagreements with others could not be settled by power or custom or appeals to established authority? Let us imagine, too, that by some alchemy these people are, in a sense, disengaged from themselves. They are human beings and so, of course, they put their own interests first, but they do not know what their own interests are beyond the fact that they may and probably will collide from time to time with the interests of others. They are like card players each of whom knows that he wants to win, but each of whom is bidding on blind hands. Yet they do know something about the general conditions of human life and the various strategies of bidding, and, armed with this information, they set out to devise rules for the distribution of the burdens and benefits of their shared existence. What kind of rules would these people, emancipated from local and temporal prejudices and unable to take account of their purely idiosyncratic tastes or special positions in the social order, decide to adopt?

This, in a general way, is the question that the traditional theory of the social contract is designed to answer. And, broadly speaking, there are two types of answers to it. One is to deal with the question as though the problem it posed was to work out a strategy of self-preservation, including in that term not simply survival but the insuring of conditions in which, whatever his purposes turn out to be, the individual has a reasonable opportunity to achieve them. The second is to take as a point of departure the insight that all the individuals concerned are separate, autonomous beings, endowed with certain characteristics, such as powers of reason and powers of decision, and to say that they are therefore endowed with certain fundamental rights that must be built into any system of law and justice they devise. I shall consider each of these strategies in turn.

The basic problem in the first strategy, it seems to me, is that the individuals concerned simply do not have enough information to reach any conclusions they can rationally defend. One possible tactic, for example, is to imagine the worst possible situation and devise safeguards against it. Would not an individual be reasonable, it might be argued, if he opted for rules that would protect him if his worst enemies were to come to power? With this assumption, he will develop, as he thinks

through the matter, something very close, perhaps, to the rules and basic rights characteristic of constitutional political systems.

But we must notice a crucial assumption that must be made to adopt this tactic. The individual must be highly averse to risk. How does he know, in his psychologically disengaged condition, that he is that kind of individual? How does he know that he is not a lion instead of a fox? And the same sort of problem of insufficient information affects every other tactic that might be devised, so far as I can see. Indeed, the information needed to make a decision goes far beyond data about one's personal predilections. It necessarily includes social, cultural, and historical information. In its essence the problem is this: we cannot decide what conditions are satisfactory or just apart from knowledge of the purposes or goals we seek. Accordingly, I am unpersuaded that a set of rules definitive of justice can be established on social contract grounds alone and independent of some stipulation as to the ideals or aims that human beings should seek. The social contract approach, at any rate in its contemporary form, is an effort to separate the search for higher principles of justice from antecedent conceptions, which are bound to vary, of excellences that define a good life. I do not believe that this separation is logically possible.

The strategy that begins with the assertion of individual natural rights strikes me as equally doomed. It is, of course, a bare physical fact, independent of social mores, that individuals, with the exception of Siamese twins and fetuses in the womb, are visibly separate. That is part (though only part) of what we mean by calling them "individuals." But it does not follow, so far as I can see, that they are therefore socially independent, or that the social web that connects them is a secondary or artificial circumstance, much less one that can be treated as though it were created by design and only to serve purposes that individuals in isolation from one another would accredit. Nor does it follow from the undeniable facts that individuals are also idiosyncratic and that they engage in internal processes of thought and decision not identical with those of any other individual and not wholly communicable to others that they are independent either factually or morally. If they are assigned rights, this is a social act, not a recognition of antecedent verities.

It is regularly argued by those who hold a view of this sort that there are two great advantages to it. First, it makes rights primary, not social goals. It therefore protects individuals from

being sacrificed to collective policies; it keeps society from treating people as means to ends. Second, it does not impose purposes and obligations on the individual on the wholly arbitrary ground that this is the will of the civilization into which he happens to be born. There is much to be said for the concerns that prompt this point of view. But with regard to the first advantage, it must be noticed that the rights of individuals may be sacrificed not only in the name of broad social purposes, but also in the name of other peoples' rights—for example, property rights. Unless it can be argued that a system of well-constructed rights will never contain any such conflicts between different rights as those envisaged, for example, by St. Thomas, such a system offers no safeguard against sacrificing the rights of some individuals to satisfy the rights of others. Indeed, once we recognize that there are conflicts between rights, the decision between them must depend not on the abstract assertion of rights but on their specific content. How this content is to be assigned and evaluated apart from an examination of the goals or ends to be served I find a mystery.

Nor do I find persuasive the argument that there is something arbitrary as a matter of general principle in imposing the purposes and obligations of an existing civilization on the individuals who, through no choice of their own, become members of it. To begin with, there is the suspicious taint of a kind of occultism in this argument. No one asks to be born, to be sure. But the situation of a fetus, or a human being not yet biologically conceived, is not to be compared to that of an adult who, say, finds himself at the front lines and complains that he is there through no choice of his own. The fetus—or the abstract possibility of existence that we dub "I" when we say "I did not ask to be born"—has no determinate will either to be born or not to be. The conscript, it may be supposed, has some formed preferences on how he would like to spend his time. I did not choose to speak English, to be born in the twentieth century, or to come under the jurisdiction of American laws from the moment of my conception. But none of these circumstances were forced on me; there was no *me* on which to force them. The *me* of which I speak is indeed partially defined by just these circumstances. I retain, to be sure, some large choices about what to do with these circumstances. But to speak of the values and purposes of a civilization as being arbitrarily imposed wholesale on individuals is to say nothing more, so far as I can see, than that all coming into being and passing away is "arbitrary."

But perhaps those who can find no grounds for imposing the obligations of an inherited civilization on individuals without their free and autonomous consent mean something else when they use the term "arbitrary." They mean, to be specific, that the consent of the individual is a necessary condition for the legitimacy of the obligations assigned to him, or at least his consent to the general procedures that lead to the assignment of these obligations. Or else they mean that his obligations are nothing more than the reverse coin of the rights of other individuals. But this is to presuppose all the points at issue—the existence of rights apart from a social framework, the moral independence of the individual, and, not least, the definition of what is morally "arbitrary."

If "arbitrary" means the violation of a rule, then the imposition of social obligations on unconsenting individuals is arbitrary only if the requirement of consent is, without agreement, accepted. But the acceptance of such a rule is itself logically arbitrary. It follows from no principle antecedent to it. Indeed, it might be asked whether there are not individuals, many of them, who autonomously reject the right to autonomy, who do not consent to the rule of consent and really prefer another basis for the organization of society. In the end, the argument that individuals are endowed, outside any specific historical or legal context, and independent of the aspirations of society, with independent moral rights, though it seeks a universalistic morality, is peculiarly parochial. It is an assertion that expresses the beliefs of people in a certain tradition and, furthermore, takes that tradition, with its emphasis on consent, to be the only natural and reasonable human tradition. In its pragmatic consequences it shows not regard for human individuality and diversity but an impatience with them.

Is there an alternative? Let me, with diffidence, suggest one. I would take a cue from what is surely a distinctive feature of the classic liberal view of the higher moral principles that should guide and confine the law. This is the stress on procedures, on ways of conducting the social competition, in contrast with the concern in other traditions with the realization of a social vision in which competition will be replaced by harmony and all complaints of injustice will be stilled because injustice will be gone.

This emphasis on procedures is not all there is to the liberal constitutional political tradition, but it is a good part of it and a central part, and since I feel no duty to pull my first principles out of the eternal heavens, I am content to use it as my point of departure.

I believe there are certain facts of the human condition, at any rate in complex and sophisticated societies, which are ubiquitous: the diversity of human tastes, the partiality of human affections, the need for withdrawal and privacy as well as solidarity, the impossibility that even very reasonable and entirely selfless men and women will arrive, without being coerced, at unanimous judgments about the decisions and policies that society ought to adopt either in general or with regard to specific cases. We carry our genes and our biographies with us, and, like our fingerprints, no man's or woman's judgment is identical to any other's. So there is an indelibly private element in all judgment, and though we may do our best, and sometimes succeed, in being objective and impartial, there is always a reason to suspect that subjectivity and partiality remain. Under these circumstances, a system of rights creating a sphere of protected individual thought and conduct seems at least *prima facie* a prudent course. Without it, values of the broadest appeal—trust, honesty, personal friendships and family attachments, the chance peaceably to review the ideas and policies accepted in society, the pursuit of truth wherever we choose to pursue it—lose their security. And I take it that the liberal constitutional emphasis on procedures receives its impulse from some such outlook.

But as I have stressed, it is impossible to settle conflicts of rights or to give sense to a system of rights as a whole without some attention not only to rules, rights, and procedures but also to ends and purposes. Liberal constitutionalism is frequently faulted on the ground that it is merely procedural, not substantive, and that proceduralism in and for itself is mere form, lacking both a reasonable ground and an emotional appeal. I think this charge justified when it is addressed to some of the most conventional philosophical interpretations of liberal principles. But I do not believe the charge is justified when it is addressed to a liberal constitutional philosophy coherently conceived. For I believe that the philosophy of liberal constitutionalism, when it is pulled together, contains, like any other social outlook, a conception of a guiding purpose, a moral ideal.

Given the description of the human condition with which liberal constitutionalism begins, and given the value it ascribes to

family, personal loves and friendships, the integrity of the inner life, and the arts, sciences, and diversities of a complex civilization, that ideal, I suggest, is a certain conception of human excellence. It begins with an idea of the individual as never wholly mappable, as having energies and aspirations that will not be neatly encased in any social box or ascribed status or vision of an ultimate civic harmony. But it goes beyond this. While recognizing the plurality of human attitudes and possibilities, it also gives special favor to a particular kind of intellectually flexible and morally dispassionate individual. Oliver Wendell Holmes came very close to catching the essence of the ideal I have in mind when he defined a civilized man as a man who can act with conviction even while doubting his first principles. An individual of this sort has an identity of his own; he is distinguishable, he distinguishes himself, from his ascribed status and social or cultural box; he is mobile intellectually and morally, able to imagine the reality of other points of view and their plausibility to those who hold them. And he desires the competition of ideas and values because he cannot imagine his own independence if that competition does not take place.

This is not the only acceptable ideal of human excellence. It is not the only ideal that a liberal society can recognize or respect. As the cliche rightly holds, a liberal society is, or ought to be, pluralistic. But it is this sort of individual who plays an indispensable part in maintaining that pluralism and in keeping it from descending into a humorless battle of ideologies or a complacent agreement to live and let live by refusing to ask any troublesome questions. So the educational systems of such a society must give special attention to the cultivation of this form of human excellence; and insofar as the laws belong to that educational system, they must do their part, cherishing this ideal, and, absent compelling and immediate necessities, taking its side when sides must be taken.

A society ought to be judged, Pericles and Plato held at the dawn of the ideal of liberal civilization, by the nature of the people it produces. Its ideals are to be appraised by the character of the people it especially prizes and at whose preservation and reproduction it aims. This was the judgment, too, of Spinoza, Milton, and Mill, and in their defenses of liberty it is the ideal of the freely thinking individual that holds everything together. There are certain questions, they held, about which an individual must make his own separate peace with his Maker or with himself. These are the great questions about God, freedom, and

immortality, about truth, about how he should conduct himself in those intimate and personal affairs that no outsider, and certainly no government, can take over from him without bungling the issues and treating him like a child. If we are to earn salvation, we have to put our souls in jeopardy, Milton thought. We have to be free to make up our own minds and act accordingly. Spinoza, Mill, and Kant, for all their differences from Milton, did not think differently on this point. They did not suppose that virtue could be defined as passive compliance with rules one has no chance to disobey. Virtue was a condition of the personality that depended on the exercise of choice.

That ideal is the central source of light, I suggest, for understanding the moral environment of law in a liberal constitutional society. The aspiration towards it is central in the assertion that all men should be credited with the rights to life, liberty, and the pursuit of happiness. These are not logically self-evident rights. They are not rights whose inviolability can be ascertained independently of any conception of the social purpose, or of the excellences most admirable in human beings. But these rights will be self-evident in the quite ordinary, nontechnical sense of the term, to men and women who wish to be independent, responsible, self-questioning human beings, and wish the same conditions for any of their fellows who will permit them to live by this ideal.